UNITED STATES GOVERMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO MATHEMATICS AND SCIENCE ACADEMY CHARTER SCHOOL, INC.,	)	
Petitioner-Employer,	)	
- and -	)	Case No. 13-RM-1768
CHICAGO ALLIANCE OF CHARTER TEACHERS AND STAFF, IFT, AFT, AFL-CIO,	)	
Respondent-Union.	)	

EMPLOYER'S REQUEST FOR REVIEW

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EMPLOYER'S REQUEST FOR REVIEW

Pursuant to Section 102.67(b) of the Rules and Regulations of the National Labor Relations Board ("Board" or "NLRB"), the Chicago Mathematics and Science Academy Charter School, Inc. ("CMSA"), hereby submits this Request for Review of the Decision and Order of Region 13's Acting Regional Director. In that Decision, Acting Regional Director Arly Eggertsen dismissed CMSA's representation petition, concluding that CMSA is a "political subdivision" of the State of Illinois, within the meaning of Section 2(2) of the National Labor Relations Act ("NLRA" or "Act").

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, Board review of this decision is necessary in order to correct a departure from well-established Board case law that has narrowly interpreted the meaning of a

"political subdivision" to include only those entities that are either: (1) created directly by the State so as to constitute a department or arm of the government; or (2) administered by individuals who are responsible to public officials or to the general electorate. *See Charter Sch. Admin. Servs., Inc.*, 353 N.L.R.B. No. 35 (2008). The Acting Regional Director ignored this two-part test, finding instead that a private 501(c)(3) not-for-profit corporation that is created by private individuals without any government involvement qualifies as a "political subdivision." Moreover, the Acting Regional Director ignored this Board's instructions in *Charter Sch. Admin. Servs.* by finding that "political subdivision" status exists despite the inability of a government entity or the electorate to remove CMSA's corporate officers. Instead, the Acting Regional Director relied primarily on the fact that CMSA receives a majority of its revenue from government entities, and that the Chicago Public School System ("CPS") reviews various aspects of CMSA's operations.

As the Employer explained in its post-hearing brief, such government revenue and oversight do not, by themselves, qualify an entity as a "political subdivision." The Board recently made this clear in *Charter Sch. Admin. Servs., Inc.* In this respect, CMSA is no different than any other government licensee or contractor that must comply with various statutes and reporting obligations imposed by federal, state and local public entities. *See id.* at slip p. 6 n.23 ("The

Board routinely asserts jurisdiction over private employers that provide services to public entities."). Otherwise, if the receipt of government revenue and the exercise of government oversight was enough, almost every state and local government contractor that is paid with government money and is subject to government oversight would be removed from NLRB jurisdiction.

CMSA respectfully submits that if the Board allows the Acting Regional Director's interpretation of "political subdivision" to stand, countless government licensees, contractors and their employees around the country will suddenly find themselves in a legal "no man's land," totally removed from the Act's coverage. By extension, the Union's proposed legal standard risks disenfranchising hundreds of thousands of employees who would otherwise enjoy the right to organize under the Act. As a result, government licensees and contractors in a number of states could avoid collective bargaining obligations altogether if their governments ever decided to "creatively" expand licensee and contractor reporting obligations (as Illinois has done here). This result is inconsistent with the Board's historical practice of narrowly construing Section 2(2)'s definition of "employer." *See San Manuel Indian Bingo*, 341 N.L.R.B. 1055, 1058 (2004).

The Board therefore should grant the Employer's Request for Review in order to address this very important issue that has far reaching impact for

charter schools, government contractors and their employees. As will be explained below, over 5,042 charter schools and 65,000 teachers across the country likely will be affected by the Regional Director's decision to forego jurisdiction over charter schools like CMSA, which solely are created by private individuals and whose governing board members are not subject to appointment or removal by a government entity. In light of the jurisdictional "stakes" involved herein, and the potential disenfranchisement of thousands of employees across the nation from enjoying rights under the Act, the NLRB should not permit such a decision to rest on the non-precedential Decision and Order of a single Acting Regional Director. Rather, if the NLRB seriously wishes to explore abdicating its jurisdiction over such a large number of employers and employees, it should do so through its own precedent-setting Decision and Order.

GENERAL BACKGROUND OF CHARTER SCHOOLS

According to the U.S. Department of Education, "charter schools" are characterized by five key features: (1) they can be created by almost anyone; (2) they are exempt from most state and local regulations, essentially autonomous in their operations; (3) they are attended by youngsters whose parents choose them; (4) they are staffed by educators who are also there by choice; and (5) they are

subject to closure if they produce unsatisfactory results. *See* U.S. DEPARTMENT OF EDUCATION, EVALUATION OF THE PUBLIC CHARTER SCHOOLS PROGRAM at 3 (2004) (available at www2.ed.gov/rschstat/eval/choice/pcsp-final/finalreport.pdf). As of November 2009, the following forty states operated approximately 5,042 charter schools:

Alaska (27)	**Arizona (566)**	Arkansas (35)
California (860)	**Colorado (166)**	Connecticut (21)
Delaware (19)	District of Columbia (100)	Florida (413)
Georgia (97)	Hawaii (32)	Idaho (35)
Illinois (88)	Indiana (55)	Iowa (9)
Kansas (39)	**Louisiana (78)**	Maryland (38)
Massachusetts (65)	Michigan (283)	Minnesota (162)
Missouri (44)	Nevada (28)	New Hampshire (11)
New Jersey (72)	New Mexico (72)	New York (154)
North Carolina (102)	Ohio (338)	Oklahoma (17)
Oregon (108)	Pennsylvania (144)	Rhode Island (13)
South Carolina (38)	Tennessee (21)	**Texas (387)**
Utah (76)	**Virginia (3)**	Wisconsin (223)
Wyoming (4)		

THE CENTER FOR EDUCATION REFORM, ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS at 8 (Jan. 2010) (available at www.edreform.com). Of these forty states, at least 11 (highlighted in bold above) do not have a comprehensive public sector collective bargaining law that permits teachers to collectively bargain with their employers. *See generally* RICHARD KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR at 60-61 (3rd ed. 2001). According to statistics compiled by the U.S. Department of Education, charter schools employed 65,500 full-time teachers

during the 2007-08 academic year. *See* U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION SERVICES, SCHOOLS AND STAFFING SURVEY (June 2009) (available at nces.ed.gov/pubs2009/2009324/tables/sass0708_2009324_t12n_06.asp).

PROCEDURAL HISTORY

On July 29, 2010, CMSA filed a petition with Region 13 (Tr. 6-7).[1] The petition asserts that a labor organization has presented a claim to be recognized as the representative of a group of CMSA employees.

Attached to the petition is a June 23, 2010 letter from the Chicago Alliance of Charter Teachers and Staff ("Union"), which states that the "teachers at Chicago Math and Science Academy have organized as a collective bargaining unit" and are "represented by the Chicago Alliance of Charter Teachers & Staff, IFT-AFT/AFL-CIO." The letter further asks CMSA to "recognize our union immediately and begin to engage in the collective bargaining process." On June 23, 2010, the Union also filed a majority interest petition with the Illinois

[1] In the event the Board requests a copy of the record evidence from the proceeding below, the Employer will provide citations to the record evidence. The hearing transcript will be referenced as (Tr. ___). Employer and Union exhibits will be referenced as (E. Ex. ___) and (U. Ex. ___), respectively.

Educational Labor Relations Board ("IELRB"),[2] demanding certification as the exclusive bargaining representative of a group of CMSA employees (Tr. 6).

On August 12, 2010, a hearing was held at Region 13's office in Chicago. After the submission of post-hearing briefs, Acting Regional Director Arly Eggertsen issued a Decision and Order on September 20, 2010, finding that CMSA was a "political subdivision" within the meaning of Section 2(2) of the Act. By extension, the Acting Regional Director concluded that the Board did not have jurisdiction to process CMSA's representation petition, and dismissed it in its entirety.

FACTS INTRODUCED DURING THE FACT-FINDING HEARING BELOW[3]

A. Establishment Of CMSA As A Not-For-Profit Illinois Corporation

In October 2003, a group of private individuals formed CMSA as an Illinois not-for-profit corporation (Tr. 14-15; E. Ex. 1). The initial registered agent for CMSA was Taner Ertekin, and CMSA's first board of directors included Ertekin, Robin LaSota, Dr. Faruk Guder, Leticia Herrera and Sunny Penedo-Chico (E. Ex. 1 at p. 1-2).

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[2] The IELRB is an Illinois state agency established to regulate labor relations between labor organizations and state educational employers, such as public universities, community colleges and school districts. *See generally* 115 ILCS 5/1 *et seq.*

[3] The Union failed to call any witnesses at the hearing to rebut these facts.

In October 2003, Ertekin filed with the Illinois Secretary of State's office an application for CMSA's incorporation pursuant to the Illinois General Not for Profit Corporation Act (Tr. 14-15; E. Ex. 1). The Secretary of State's office subsequently confirmed the creation of CMSA in an October 8, 2003 letter (Tr. 16; E. Ex. 1 at p.1). Subsequently, CMSA applied for, and was granted, tax exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code (Tr. 16; E. Ex. 2).

None of the other original CMSA board members were government officials at the time CMSA was created (Tr. 15). Likewise, no government entity directly created CMSA, nor did any government entity have any involvement in the creation of CMSA as a not-for-profit corporation (Tr. 16).[4]

B. CMSA's Location, Real Property And Revenue

CMSA's primary place of business is located at 7212 North Clark Street, Chicago, Illinois 60626 (Tr. 37). A 43,000 square foot school building and a parking lot are physically located at this address (Tr. 38). CMSA owns the property and building at 7212 North Clark Street (Tr. 38). No government entity shares in the ownership of this property (Tr. 38).

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[4] CMSA's Board of Trustees hired Ucan as CMSA's first principal (Tr. 17). Ucan served as CMSA's principal from 2004 through 2008 (Tr. 12).

During CMSA's 2007-08 and 2008-09 fiscal years, CMSA earned gross revenue in excess of $3 million and $4 million, respectively (Tr. 40-41; E. Ex. 6). During fiscal year 2009-10, CMSA again earned more than $1 million (E. Ex. 7). Approximately 80 percent of CMSA's revenue is obtained from the Chicago Public School System ("CPS"), based on a "per pupil" formula (which currently consists of approximately $7,213 per student per school year) (Tr. 38).[5] The other 20 percent consists of federal and state grant money, as well as private fundraising (Tr. 38-39).[6]

During fiscal year 2009-10, CMSA's gross amount of purchases from firms outside the State of Illinois totaled more than $50,000 (including for example books and student lockers) (Tr. 42-43; E. Ex. 7). During the same time period, CMSA's gross amount of purchases from firms which, in turn, purchased goods from outside the State of Illinois totaled more than $50,000 (including various furniture items) (Tr. 43-44; E. Ex. 7).[7]

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[5] This "per pupil" funding from CPS is paid in four equal installments throughout the school year (Tr. 39).

[6] During CMSA's last fiscal year, it raised approximately $120,000 in grant money from private corporations like Motorola and SNC (Tr. 67-68).

[7] As previously stated, the Union did not offer any evidence at the hearing to contest these jurisdictional facts.

C. Description Of CMSA's Governing Board

According to the unrebutted testimony of Ali Yilmaz, CMSA's organizational structure is described accurately in a set of By-Laws (Tr. 27, 32; E. Ex. 4). Article III of these By-Laws establishes a Board of Trustees[8] as the body that conducts and directs the affairs of CMSA (E. Ex. 4). Among other powers, CMSA's Board can:

- elect and remove Board members;
- select and remove CMSA officers, agents and employees, and to fix their compensation;
- conduct, manage and control the affairs and activities of CMSA, and to make rules and regulations;
- enter into contracts, leases and other agreements that are, in the Board's discretion, necessary or desirable in obtaining the purposes of promoting CMSA's interests;
- carry on the business of operating a charter school and apply any surplus that results from that business activity to any activity in which CMSA may engage;
- acquire real or personal property;
- borrow money, incur debt, and to execute and deliver promissory notes, bonds, deeds of trust and mortgages; and
- indemnify and maintain insurance on behalf of any of CMSA's trustees, officers, employees or agents for liability asserted against or incurred by such person.

(E. Ex. 4).

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[8] The term "Board of Directors" is used interchangeably with "Board of Trustees" (Tr. 28).

Article III.B of the By-Laws requires that the number of CMSA Board members be at least five, but no more than nine (Tr. 25; E. Ex. 4). Article III.C of the By-Laws describes the appointment procedure for CMSA Board members (E. Ex. 4). CMSA Board members themselves are responsible for filling a vacant position on the Board (Tr. 29). A majority vote of the Board is necessary in order to appoint an individual as a Trustee (E. Ex. 4). Similarly, the Board may remove an individual from his Trustee position (E. Ex. 4).[9] As explained by Ali Yilmaz, it has been CMSA's practice that when a Trustee decides to resign, the resigning Trustee recommends his or her own replacement (Tr. 29). The remaining Board members then vote on whether to appoint the replacement as a new Board member (Tr. 29).

No government entity has ever appointed, or has the power to appoint, a CMSA Trustee (Tr. 30). Likewise, no government entity has ever hired, or has the power to hire, a CMSA employee (Tr. 30). CPS does not have any involvement in the selection or appointment of CMSA Board members and employees (Tr. 31).[10] Similarly, CPS has no involvement when CMSA decides to

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[9] The Board has never been called upon to vote on removing one of its members (Tr. 30).

[10] CMSA can decide whether to employ its own special education personnel, or whether it should retain such personnel from CPS (Tr. 31). If CMSA decides to hire its own special education personnel, CPS has no involvement in CMSA's hiring process (Tr. 31, 60-61). CMSA currently hires its own special education teachers, and is reimbursed

interview and hire a teacher (Tr. 96). The CMSA-CPS charter agreement does not address the identity of CMSA Trustees, or otherwise authorizes CPS to appoint CMSA Trustees (Tr. 51).

No government entity has ever removed, or has the power to remove, a CMSA Board member (Tr. 31). Likewise, no government entity has ever terminated, or has the power to terminate, a CMSA employee (Tr. 32). The CMSA-CPS charter agreement does not authorize CPS to remove CMSA Board members, nor does it address the removal of CMSA Board members (Tr. 51).

CMSA's Board of Trustees consists of seven (7) members (Tr. 25). These members currently include:

- Yavuz Burak Canbolat -- Board President
- Sulejman Dizdarevic - Board Member
- Jeff Kulenovic -- Secretary
- Ali Yurtsever -- Board Member
- Murat Surucu -- Board Member
- Edip Pektas -- Treasurer
- Hanefi Tiryaki -- Board Member

(Tr. 26; E. Ex. 3). None of these individuals are government officials, nor do they work for a government entity (Tr. 26).

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by CPS for no more than seven at a maximum salary of $65,000 (Tr. 62-63). CMSA can hire more than seven (7) special education teachers at salaries greater than $65,000, but would have to cover any additional expenses out of its own operational budget (Tr. 63).

D. CMSA's Retention Of "Concept Schools" As An Agent That Manages Its Charter School

Pursuant to its authority to select "agents" (E. Ex. 4 at Art. IIIA), CMSA has retained the services of a private corporation by the name of "Concept Schools" (Tr. 18-19). Concept Schools is a not-for-profit charter school management organization (Tr. 10). Concept Schools provides comprehensive management services to charter schools, including "start-up" help, curriculum development and fiscal management (Tr. 10, 97).[11]

Concept Schools was created by private individuals (Tr. 10). Concept Schools is managed by a board of directors, chief executive officer and a vice president (Tr. 10). None of these individuals work for a government entity, or are appointed or subject to removal by a government entity (Tr. 10-11).

Based on its 2008 contract with CMSA, Concept Schools helps manage CMSA's charter school by supplying a principal and business manager (Tr. 18-19). CMSA's principal (currently Ali Yilmaz, who is employed by Concept Schools) is responsible for setting the overall goals and vision of the school (E. Ex. 9 at 31). In addition, the principal is responsible for all day-to-day CMSA operations, including but not limited to the supervision and evaluation of

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[11] While CMSA submits its curriculum plan to CPS as part of its application process, CMSA does not have to submit any type of periodic report to CPS regarding its curriculum (Tr. 97).

teachers, employee hiring decisions, the renewal of employment contracts for upcoming school years, employee conflict resolution, administrative meetings, professional staff development plans and budget decisions (Tr. 54-55). The principal is also responsible for the overall supervision of CMSA's compliance with its CPS charter agreement (Tr. 55). CMSA's principal is not a government official, nor is he appointed by a government entity (Tr. 58).

The business manager (currently Hilal Kaya, who is also directly employed by Concept Schools) (Tr. 57) is responsible for purchasing decisions, retention and payment of vendors, financial monitoring and reporting, the supervision of employee payroll and benefits and the evaluation and supervision of paraprofessional and maintenance staff (E. Ex. 9 at 31-32). No government entity has the authority to appoint the business manager for CMSA (Tr. 57). Except for CMSA's principal and business manager, all other CMSA staff members (including teachers) are employees of CMSA (Tr. 19).

E. CMSA's Workforce And Employee Wages And Benefits

CMSA directly employs approximately 50 employees (Tr. 55). These employees include teachers (approximately 35), administrative staff, custodians and secretaries (Tr. 56).

CMSA is ultimately responsible for approving the wage and benefit package that is offered to CMSA employees (Tr. 33). CMSA's principal administers

efforts to develop the wage and benefit package, which is then submitted to the CMSA's Board of Trustees for consideration (Tr. 33). The CMSA Board then has the authority to either approve or deny the wage and benefit package (Tr. 33). Nothing in the CMSA-CPS charter agreement addresses the pay and benefits that must be offered to CMSA employees (Tr. 51).

CMSA summarized the various benefits that employees enjoy in a Personnel Handbook that covered the 2009-10 school year (Tr. 35-36; E. Ex. 5). CMSA's 2009-10 Personnel Handbook outlines the various rules and benefits that cover employees by virtue of their employment with CMSA, including but not limited to:

- Code of Ethics for professional staff (p.4)
- Prohibition against employee conflicts of interest (p.4)
- Rules relating to the ability of employees to examine their personnel records (p.5)
- Guidelines for employee supervision of students (p.7)
- Rules regarding the transportation of students in a staff member's personal vehicle (p.8)
- "At-will" employment status (p.9)
- Definitions for part-time versus full-time personnel based on weekly hours worked (*i.e.*, 20 or more hours in a week qualifies an employee for full-time status) (p.9)
- Standard work day, including starting and ending times for different categories of employees (p.9)
- Rehiring standards (p.9)

- Hourly stipends for teachers who volunteer to work beyond the end of their regularly scheduled work day (*i.e.*, an additional $20.00 per period covered) (p.10)
- Pension benefits for teachers (p.10)
- The types of health insurance plans offered to employees, and the employee's share of the cost for such health insurance (*i.e.*, CMSA pays 100% of the cost of employee health insurance, with the employee paying nothing) (p. 10)
- Paid sick and personal leave days (up to 8 days per year of paid sick and personal days; any unused days at the end of the school year will be paid out at the rate of $100 per day) (p.11)
- Funeral and birth leave (*i.e.*, up to 3 days of sick leave may be used for these purposes) (p.11)
- Rules regarding reimbursement for travel expenses (p.12)
- Rules for reporting absences (p.12)
- Staff dress and grooming standards (p.13)
- Anti-harassment and complaint policy (p.13)
- Drug-free workplace policy (p.14)
- Rules regarding Internet usage (p.15)
- Anti-violence policy (p.16)

(Tr. 36-37; E. Ex. 5). No government entity directed CMSA to develop the 2009-10 Personnel Handbook, nor did any government entity instruct CMSA what terms and conditions of employment to include in the Handbook (Tr. 37).

In terms of employee wages, the CMSA Board provides its principal with discretion for setting the wages of newly hired employees (Tr. 34). Within these parameters, the principal is authorized to negotiate a wage rate for a newly hired

employee (Tr. 34). No government entity plays a role in determining the specific amount of wages that are paid to a new or continuing CMSA employee (Tr. 34).

Similarly, CMSA has determined the specific type of health insurance plan that is offered to its employees (Tr. 34). CMSA's principal recommends to the CMSA Board several different health insurance options, and the Board selects one of the options (Tr. 34-35). Likewise, the CMSA Board determines the amount an employee must pay for health insurance coverage (Tr. 35). No government entity plays a role in determining the health insurance plan that will be offered to CMSA employees, or the amount of employee contributions for health insurance coverage (Tr. 35).

The CMSA Board also has determined the number of paid leave days that are offered to employees (Tr. 35). No government entity plays a role in setting the number of paid days off that are offered to CMSA employees (Tr. 35).

As for teacher pension contributions, CMSA is required by its charter agreement with CPS to make a contribution on behalf of each teacher to the Chicago Teachers Pension Fund, in an amount equivalent to 9 percent of the teacher's salary (Tr. 80). However, CMSA has the discretion to decide how much of that 9 percent it will pay, and how much the teacher will pay (Tr. 81). In this regard, the CMSA Board has exercised its discretion to contribute 7 percent of a

teacher's salary, while employees only have to cover the remaining 2 percent (Tr. 81).

F. CMSA's "Charter" With The Chicago Public School System

Pursuant to Illinois law, Illinois school districts are permitted to contract out the provision of educational services to third party entities. *See* 105 ILCS 5/27A-1 *et seq.* Colloquially called "charter schools," these third party entities must comply with a variety of statutory conditions and requirements that are outlined in Article 27A of the Illinois School Code (*i.e.*, the "Charter School Law"). *See id.* Absent a charter being issued by a school district, an entity cannot provide charter school services to Illinois students. *See* 105 ILCS 5/27A-6(a). According to the Illinois Charter School Law, a "charter" constitutes a "binding contract and agreement between the charter school and a local school board under the terms of which the local school board authorizes the governing body of the charter school to operate . . . on the terms specified in the contract." *Id.*

Pursuant to the Illinois Charter School Law, CMSA has entered into a charter agreement with CPS (Tr. 45). CPS serves as the sponsor and authorizer for CMSA to operate a charter school in Chicago (Tr. 45). The charter agreement with CPS is for a five-year period, after which CMSA is required to submit a renewal application (Tr. 45-46). According to this charter agreement, CMSA does

not "serve as the agent, or under the direction or control, of CPS" (Tr. 52; E. Ex. 9 at p.21).

The current charter agreement between CMSA and CPS (whose term extends from 2009 through 2014) sets forth a number of reporting requirements with which CMSA must comply (Tr. 46; E. Ex. 8). This charter agreement is based on CMSA's renewal application that was submitted in 2008 (Tr. 47-48; E. Ex. 9). CMSA's Board of Trustees and Concept Schools together were responsible for drafting and formulating the 2008 charter renewal application form (Tr. 47-48).

The various reporting requirements set forth in CMSA's charter agreement are summarized in a two-page document that is published by CPS (U. Ex. 1). Among other things, CMSA is responsible for filing with CPA a list of its Board members, minutes from its Board meetings, student disciplinary policies, a school year calendar, student attendance data, annual and quarterly budget information, specifications for a student admission lottery system, information regarding the expulsion of students, student transfer updates, and annual financial and compliance audits (U. Ex. 1; Tr. 71-77). CMSA is also required to submit various reports to the federal government and State of Illinois, including for example documentation relating to federal grants under Title I of the "No Child Left Behind Act," and information relating to emergency drills under the Illinois School Safety Drill Act (U. Ex. 1).

CMSA's Finance and Audit Committee ("FAC") is responsible for the development of CMSA's annual budget (Tr. 49-50). The CMSA FAC constitutes a subset of the CMSA Board of Trustees, and includes the CMSA President, Treasurer and Secretary (Tr. 50). Thus, no FAC member is a public official or was appointed by a government entity (Tr. 57). The FAC is responsible for conducting audits of CMSA's finances, developing CMSA's annual budget, and producing accurate and complete financial statements (Tr. 50). As further explained in CMSA's Accounting & Financial Policies and Procedures Manual:

> The Finance & Audit Committee is responsible for direction and oversight regarding the overall financial management of CMSA. The FAC is responsible for recommending the hiring of an independent CPA firm and for directly communicating with the CPA firm to fulfill the requirement for an annual audit. The FAC shall also review and approve the final audited financial statements, as well as any communications received from the auditor regarding internal controls, illegal acts, or fraud. The FAC also serves as the primary point of contact for any employee who suspects that fraud has been committed against CMSA or by one of its employees or board members. Other functions of the FAC include:
>
> 1. Review and recommendation of the organization's annual budget (prepared by the staff) for final approval by the full board.
>
> 2. Monthly review of the statement of activities (including budget-to-actuals), statement of financial position (balance sheet), and statement of cash flows.
>
> 3. Long-term financial planning
>
> 4. Evaluation and approval of facilities decisions (*i.e.*, leasing, purchasing property)

5. Monitor actual vs. budgeted financial performance

6. Oversight of reserve funds

7. Conduct announced and unannounced audits and/or site visits.

(Tr. 50; E. Ex. 10 at p.5-6). No government entity (including CPS) directed CMSA to create the Accounting & Financial Policies and Procedures Manual (Tr. 54). Nothing in this document references a government entity as being involved in the establishment or approval of CMSA's annual budget (E. Ex. 10).

When developing the CMSA annual budget, the finance and audit committee collaborates with CMSA management staff (Tr. 87-88). CMSA uses an internal budget system that differs from the template developed by CPS (Tr. 93). Once CMSA's budget is developed, CMSA re-categorizes its financial information in a template developed by CPS (Tr. 93). The CPS draft budget template includes blank line items (Tr. 88). These blank line items identify a variety of different budget categories, such as expenditures, student expenses, employee salaries, employee benefits and other miscellaneous expenses (Tr. 93). During the budget deliberation process, however, CPS provides no input into how CMSA should allocate its resources among the various line items (Tr. 88).

Once CMSA's Board of Trustees has approved an annual budget, CMSA must submit that budget (as well as quarterly reports) to CPS (Tr. 70, 88). CPS has never rejected or modified one of CMSA's quarterly or annual budget

submissions (Tr. 88). At most, CPS might correct typographical errors, or ask for clarifications if it has questions about certain numbers contained in the budget report (Tr. 89).[12]

ARGUMENT

The Acting Regional Director erred in finding that CMSA qualifies as a "political subdivision" within the meaning of Section 2(2) of the Act.[13] The NLRB has defined an "employer" as an entity that "controls *some* matters relating to the employment relationship" involving petitioned-for employees. *See Management Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995) (emphasis added). In this case, CMSA controls literally *all* of its employees' basic terms and conditions of employment, including but not limited to wages, health insurance, hiring and discipline. As a result, CMSA meets the definition of "employer" under the NLRA, unless it somehow falls within one of the limited exceptions outlined in

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[12] On a single occasion, CPS personnel asked for clarification about certain budget numbers, based on a large number of loans that CMSA had secured from different banks for the purchase of CMSA's new school building (Tr. 89). CPS personnel wanted to ensure that the numbers were properly presented, along with the appropriate amortization values (Tr. 94). After receiving its clarification, CPS did not reject the budget (Tr. 89).

[13] The Union failed to present a *scintilla* of evidence at the hearing that CMSA does not meet the Board's jurisdictional revenue minimums, or that Ali Yilmaz' estimate of the amount that CMSA spent on goods and services over the last fiscal year was in any way inaccurate. As a result, it is undisputed that CMSA meets the Board's discretionary jurisdictional standards.

Section 2(2) of the Act. *See* 29 U.S.C. § 152(2). One of those limited exceptions involves a "State or political subdivision thereof." *See id.*

It is well-established that a party that seeks to avoid NLRB jurisdiction has the burden of proving the applicability of one of Section 2(2)'s limited exceptions. *See, e.g., Delta Health Ctr., Inc.*, 310 N.L.R.B. 26, 28 (1993); *Int'l Ass'n of Firefighters*, 292 N.L.R.B. 1025, 1026 (1989) (citing *NLRB v. Austin Develop. Ctr., Inc.*, 606 F.2d 785, 789 (7th Cir. 1979)). By the same token, the NLRB has declared that it will narrowly construe the exceptions to the definition of "employer" found in Section 2(2). *San Manuel Indian Bingo*, 341 N.L.R.B. at 1058. With these two principles in mind, the Union has failed in this case to prove that CMSA qualifies as a "political subdivision" of the State of Illinois.[14] By extension, the Acting Regional Director misapplied Board case law in finding that CMSA qualifies as a "political subdivision."

I. The Acting Regional Director Erred In Concluding That CMSA Was *Directly* Created By The State Of Illinois, So As To Constitute An "Arm" Of The Government

According to the U.S. Supreme Court, an entity is exempt from Board jurisdiction under the "political subdivision" exception if it is either: (1) created *directly* by the State so as to constitute a department or arm of the government; or

[14] The Union chose to call no witnesses at the hearing to testify in support of its position that the NLRB lacks jurisdiction over CMSA.

(2) administered by individuals who are responsible to public officials or to the general electorate. *See NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 604-05 (1971) (emphasis added).

In summarizing the first prong of this test, the Acting Regional Director conveniently omitted the term "directly" on page 8 of its Decision. This is significant, because the NLRB historically has narrowly applied the first prong of the *Hawkins* test to only those situations where a government entity literally has "created" an employer via some type of statutory proclamation. For example, in *State Bar of New Mexico*, 346 N.L.R.B. 674, 676 (2006), the Board found that the New Mexico State Bar was "directly" created by a New Mexico Supreme Court Rule that stated in relevant part: "[t]he Supreme Court of New Mexico does hereby create[s] and continue[s] and organization known as the State Bar of New Mexico." Other examples of entities that have been "directly" created by a government include public transportation agencies, *see, e.g., Crilly v. Southeastern Pennsylvania Transp. Auth.*, 529 F.2d 1355, 1358 (3d Cir. 1976) (Pennsylvania statute specifically referenced the creation of SEPTA), libraries, *see, e.g., The New York Institute*, 254 N.L.R.B. 664 (1981) (the New York legislature specifically created educational and residential care facility), local health boards, *see, e.g., Association for the Developmentally Disabled*, 231 N.L.R.B. 784 (1977) (county board passed resolution that explicitly "created" the ADD); and low income aid

programs. *See, e.g., Hinds County Human Resource Agency*, 331 N.L.R.B. 1404 (2000) (county governing board created human resource agency).

By contrast, when private individuals request permission to create an entity via a statutory process, the NLRB has found that the first prong of the *Hawkins* test is *not* met. For example, in *Research Found. of the City Univ. of N.Y.*, 337 N.L.R.B. 965, 965 (2002), a group of private citizens took advantage of the New York Education Law by requesting incorporation as a not-for-profit entity. Based on the citizens' request, the New York Board of Regents granted a "charter." *See id.* There was no evidence that a state agency initiated the creation of the employer. Based on these facts, the Board declared that "[t]he creation of the Employer by private individuals as a private corporation, without any state enabling action or intent, clearly leaves the Employer outside the ambit of the Section 2(2) exemption." *Id.* at 968; *see also Truman Med. Ctr. v. NLRB*, 641 F.2d 570, 572 (8th Cir. 1981) (medical centers organized under not-for-profit statute and requiring no special legislative action for creation were not considered an "arm of a state" under the first prong of the *Hawkins* test); *C.I. Wilson Academy*, 2002 WL 1880478, Case No. 28-CA-16809 (NLRB ALJ 2002) (charter school did not meet first prong of the "political subdivision" test because it was not created *directly* by the State of Arizona).

In light of these decisions, the undisputed facts in this case establish that CMSA was not "directly created" by the State of Illinois. For example, neither the Union nor the Acting Regional Director could dispute that a group of private individuals with no government affiliation incorporated CMSA in October 2003 by filing the appropriate paperwork with the Illinois Secretary of State (E. Ex. 1). In this respect, no government entity played a role in CMSA's formation. As will be explained below, the Acting Regional Director reached the opposite conclusion based on an erroneous interpretation of Illinois statutes and a handful of non-precedential Regional Director decisions.

A. Erroneous Reliance on Illinois' Charter School Law and Educational Labor Relations Act. The Acting Regional Director's reliance on Illinois law was erroneous for several reasons. First, the Acting Regional Director paid "lip service" to the U.S. Supreme Court's pronouncement that federal, not state, law controls the determination of whether a an entity qualifies as a "political subdivision." The reason for this principle is obvious. In the words of the U.S. Supreme Court:

> Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial,

> or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

Natural Gas Utility Dist. of Hawkins County, 402 U.S. at 60-04 (quoting *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60 (4th Cir. 1965)). The NLRB's interest in creating a uniform national labor policy cannot be held hostage by parochial designations of "political subdivision" status. *Cf. San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1967) ("to allow the State to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy"); *Chamber of Commerce of the United States v. Lockyer*, 554 U.S. 60 (2008) (applying *Garmon* doctrine to find that NLRA preempted California statutes that prohibited employers from using state grant money to dissuade employees from assisting, promoting or deterring union organizing).

Despite the Supreme Court's concern regarding the abdication of NLRB jurisdiction to a "patchwork" of state law pronouncements, the Acting Regional Director proceeded to give undue weight to the Illinois Charter School Law and Illinois Educational Labor Relations Act. By doing this, the Acting Regional Director has risked abdicating the NLRB's jurisdiction to the whims of state and local legislatures. What if, for example, a state legislature decided one day to declare all gaming establishments within its borders to be "public entities," subjecting them to various public regulatory conditions and "sunshine" laws?

Could such a legislative declaration (possibly prompted by certain industry leaders) secure the removal of large segments of the nation's economy from NLRB jurisdiction? The NLRB presumably would never tolerate such an encroachment on its jurisdiction. By extension, the NLRB should reject the Acting Regional Director's blind acceptance of the State of Illinois' declaration that charter schools are "within the public school system," and that charter schools are subject to the Illinois Educational Labor Relations Act for collective bargaining purposes.

Even assuming *arguendo* that these state law pronouncements have some minimal value in the "political subdivision" context, the Acting Regional Director nevertheless misread these state statutes. As explained above, the first prong of the *Hawkins* test questions whether a legislative or executive body has *directly* created an entity via some type of statutory enactment. Significantly, neither the Illinois Charter School Law nor the Illinois Educational Labor Relations Act establishes a specific charter school, nor does either of them specifically mention CMSA as a charter school. Both statutes simply outline a set of regulations with which charter schools must comply. In the end, private individuals are responsible for taking the initiative to create a charter school under Illinois law. As a result, neither of these two Illinois statutes have any

relevance for determining whether an employer meets the first prong of the "political subdivision" test.

If a statutory application process was enough to transform an entity into a "political subdivision," then literally every corporation and partnership in the United States would be rendered a "political subdivision." The NLRB can take judicial notice of the fact that all 50 states have laws that regulate and govern how private individuals can go about forming a corporation or partnership. Typically, most of these procedures require final approval from a state agency or official (*e.g.*, a secretary of state). This incorporation process is analogous to the charter school certification process outlined in the Illinois Charter School Law. In both contexts, an individual or group of private citizens apply to a government entity for permission to conduct business in a particular field. The NLRB already has held, however, that such an authorization process does not transform an employer into a "political subdivision" within the meaning of Section 2(2) of the Act. *See Research Found. of the City Univ. of N.Y.*, 337 N.L.R.B. at 968 (employer was not a political subdivision merely because a group of private individuals petitioned a government entity for its creation under New York's Education Law). As a result, the Acting Regional Director erred by giving any weight to the legislative pronouncements found in the Illinois Charter School Law and Educational Labor Relations Act.

B. Erroneous Reliance On Regional Director Decisions. Similarly, the Acting Regional Director erroneously relied on two decisions from NLRB Regional Directors in California. For several reasons, such decisions are of little value for determining whether CMSA is a political subdivision of the State of Illinois. First, it is well-established that such Regional Director decisions are of limited precedential value. *See The Boeing Co.*, 337 N.L.R.B. 152, 153 n.4 (2001) ("unreviewed Regional Director decisions have no precedential value"). Rather, the Acting Regional Director was required to follow applicable NLRB precedent.

Second, the Regional Director decisions in *Los Angeles Leadership Academy*, Case No. 31-RM-1281 (2006) and *Education for Change*, Case No. 32-RM-801 (2006) both pre-date the Board's interpretation of "political subdivision" as set forth in *Charter Sch. Admin. Servs., Inc.*, 353 N.L.R.B. No. 35 (2008). As a result, neither Regional Director had the benefit of the NLRB's subsequent analysis regarding what it takes to qualify as a "political subdivision" under the *Hawkins* test, thereby minimizing the Decisions' persuasive value.

Third, for the same reasons as set forth above, the two Regional Directors apparently misapplied the first prong of the *Hawkins* test (just as the Acting Regional Director did in this case). Rather than limiting themselves to analyzing whether California law specifically "created" charter schools, the Regional Directors found significant the fact that a regulatory scheme authorized private

individuals to establish a company with governmental approval. These two non-precedential decisions therefore were erroneously decided, and the Acting Regional Director erred by relying on those two decisions.[15]

C. The Two Cases Cited By The Acting Regional Director are Distinguishable From The Current Fact Pattern. Finally, the Acting Regional Director cited two Board decisions in support of his analysis at the first prong of the *Hawkins* test. However, one case did not involve a statutory scheme like the present case where private individuals have petitioned a government agency for permission to conduct business. For example, in *Hinds County Human Resource Agency*, 331 N.L.R.B. 1404 (2000), a Mississippi state law permitted county boards to establish programs to assist low income people. Pursuant to such a law, the Hinds County Board of Supervisors specifically created the "Hinds County Human Resource Agency." *See id.* Therefore, *Hinds County* is not a case like the present one where a group of private individuals petitioned the government for permission to do business pursuant to a statutory application process. Because the NLRB in *Hinds County* relied particularly on the employer's creation by a county government, *see id.* at 1405, the analysis in that case has no application to the current fact-pattern.

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[15] The Acting Regional Director's analysis closely parallels the California Regional Directors' decisions, suggesting that he largely relied on these two non-precedential decisions instead of binding NLRB precedent.

Likewise, the Board's analysis in *Jervis Public Library Ass'n, Inc.*, 262 N.L.R.B. 1386 (1982) has no application to the fact of this case. In *Jervis*, the University of the State of New York had for over 85 years included the Jervis Library as an integral part of its library system. While the *Jervis* decision provided few specifics regarding the library's original establishment in 1894, the fact remained that the University of the State of New York treated the library as its administrative arm for the greater part of the 20th century. *See id.* at 1388. Here, by contrast, there is very clear evidence that CMSA was created solely by private individuals with no government affiliation. Furthermore, there is no record of a government entity treating CMSA as its "administrative arm" for over 85 years.[16]

D. Conclusion. The Acting Regional Director overlooked the fact that in order to satisfy the first prong of the *Hawkins* test, an employer must have been *directly* created by a government entity. Establishment by private individuals through an application process is not enough. In this respect, the Acting Regional Director failed to follow the NLRB's direction in cases such as *Research Found. of the City Univ. of N.Y.*

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[16] In any event, the analysis in *Jervis* is arguably inapplicable, because of its application during a time when the NLRB still employed its "degree-of-control" test, which required an analysis into the extent to which a government entity could affect employee terms and conditions of employment. The Board rejected the "degree-of-control" test in 1995. *See Management Training Corp.*, 317 N.L.R.B. at 1358.

To the extent that the Board believes that this is even remotely a "close call," it should grant CMSA's Request for Review in order to provide guidance for the thousands of charter schools around the country that are subject to similar regulatory schemes. In *State Bar of New Mexico*, then–Member Walsh recognized the significant impact of a jurisdictional decision like the one at hand:

> At best, this is a close case involving a private, non-profit enterprise, with some functions that are public in nature. In these circumstances, and in the absence of any clear authority establishing that the State Bar is a political subdivision, as that term is used in Section 2(2) of the Act, the Board should assert jurisdiction. *If we refuse to do so in a close case because of an expansive reading of a jurisdictional exemption, we abdicate our responsibility to assure employees the fullest freedom to exercise the rights guaranteed by the Act.* As the Board has recently recognized, the "exemptions provided in Section 2(2) are to be narrowly construed." *San Manuel Indian Bingo & Casino*, 341 NLRB 1055, 1058 (2004).

346 N.L.R.B. at 681 (emphasis added) (Member Walsh dissenting).[17] Based on then-Member Walsh's reasoning, the NLRB should grant CMSA's Request for Review.

As explained below, the potential disenfranchisement of thousands of schools employees across the nation warrants a precedent-setting NLRB decision instead of a non-binding decision and order from a single Regional Director.

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[17] CMSA assumes that the Acting Regional Director was not influenced by the existence of Illinois' state public sector collective bargaining law, which some have argued applies to charter schools like CMSA. Otherwise, his decision is extremely short-sighted, in light of those many states that do not have public sector collective bargaining laws that can serve as a "safety net" in the event the NLRB declines to exercise jurisdiction over a particular charter school.

II. The Acting Regional Director Erred In Concluding That CMSA's Board of Directors Are "Responsible" To Public Officials

The Acting Regional Director also erred when he concluded that CMSA's Board of Directors was "responsible" to public officials. In this respect, the NLRB recently clarified the proper analysis under this second prong of the *Hawkins* test:

> In determining whether an entity is "administered" by individuals responsible to public officials or to the general electorate, the relevant inquiry is whether the individuals who administer the entity are appointed by and subject to removal by public officials. . . . Specifically, the Board looks to whether the composition, selection, and removal of the employer's board of directors are determined by law or by the employer's own governing documents.
>
> . . .
>
> The ***sole focus*** here, therefore, is on the composition of the Employer's board of directors and to whom the members of the Employer's board are accountable.

Charter Sch. Admin. Services, Inc., 353 N.L.R.B. No. 35 at slip p. 5 (emphasis added). In light of this directive, the "sole focus" of the second prong of the *Hawkins* test must be whether an employer's governing body is subject to appointment or removal by a government entity.

The Acting Regional Director avoided this directive by reading certain aspects of *Charter Sch. Admin. Servs.* out of context. According to the Acting Regional Director, the Board at the second prong of the *Hawkins* test looks at a variety of factors in order to determine whether a governing board is

"responsible to public officials," including but not limited to the extent of public funding, the extent to which expenditures are subject to financial reporting and auditing strictures, and whether the entity is governed by public record and open meetings statutes. *See* Decision at p.12. According to the Acting Regional Director, the Board "did consider the aforementioned factors in" their entirety, and only after this analysis did the Board focus on the appointment and removal of the employer's board of directors. *See id.*

CMSA respectfully submits that the Acting Regional Director completely misread the Board's decision. In a single footnote, the Board does briefly mention that the employer in *Charter Sch. Admin. Servs.* did not receive public funds directly, did not need public approval for its corporate budget, and was not subject to state "sunshine laws." *See* 353 N.L.R.B. slip op. at p.5 n.17. However, the Board very clearly stated that these facts simply "reinforced" the conclusion that no government entity was responsible for appointing or removing the members of the employer's governing body. *See id.* By extension, the Acting Regional Director's "sole focus" should have been on whether CMSA's governing board is subject to appointment or removal by a government entity like the State of Illinois or the Chicago Public School System.

If the Acting Regional Director had properly applied this standard, he would have found that CMSA clearly satisfies the second prong of the "political

subdivision" test. The record evidence indisputably shows that the composition of CMSA's governing board is exclusively established by CMSA's own internal By-Laws. Specifically, Article III.B of the By-Laws sets the size of the governing board at between 5 and 9 members.

No federal, state or local law addresses the composition of an Illinois charter school's governing board. For example, the Illinois Charter School Law does not specify the size of a charter school's governing body, nor does it address the identity of the board members. Similarly, CMSA's charter agreement with CPS does not address the specific number or identities of CMSA's governing board members, except to repeat the minimum number as outlined in CMSA's By-Laws. As Principal Ali Yilmaz explained, however, this provision was inserted simply became that number was already included in CMSA's By-Laws (Tr. 63). As a result, no government entity can (or has) affected the composition of CMSA's Board of Trustees.

As for the appointment and removal of CMSA board members, it is also undisputed that no government entity has the power to appoint or remove a CMSA Trustee, much less a CMSA employee. Specifically, the Illinois Charter School Law does not address who can appoint or remove a charter school's governing board and/or employees. CMSA's charter with CPS also does not address these issues.

Rather, CMSA's By-Laws are the exclusive source for determining the process for Board appointments and removals. As explained in Article III.C, the CMSA Trustees themselves are responsible for filling Board vacancies by a majority vote (E. Ex. 4). Board members are also authorized to remove one of their fellow board members (E. Ex. 4).

CMSA is also exclusively responsible for hiring and/or terminating all of its employees. No government entity has the authority to, or plays a role in, the appointment or termination of any CMSA employees, including for example the interview and hiring of teachers (Tr. 96).

The facts in this case regarding the appointment and removal of management representatives is almost indistinguishable from the fact pattern in *Charter Sch. Admin. Servs.*, where the NLRB made the following findings:

> The members of the Employer's board of directors are elected by the Employer's shareholders, who also have the power to remove a director with or without cause. The Employer's corporate officers are elected or appointed by and subject to removal by the Employer's board of directors. No individual responsible for the Employer's operations -- no member of the Employer's executive board, and no member of the Employer's administrative staff--is appointed by and subject to removal by any public officials. There is no indication that the Employer's board of directors or its corporate officers have "direct personal accountability to public officials or the general electorate."

353 N.L.R.B. No. 35 at slip p. 5. Based on those facts, the NLRB found that the employer did not qualify under the second prong of the "political subdivision" test.

The Acting Regional Director attempted to further distinguish the applicability of *Charter Sch. Admin. Servs.* by pointing out that the employer in *Charter Sch. Admin. Servs.* was simply a management corporation that was retained by a charter school. According to the Acting Regional Director, this fact is significant, because CMSA as a charter school is "directly" responsible to a supervising public entity in terms of financial reporting requirements and sunshine laws. *See* Decision at p.13. By contrast, management corporations typically are "one-step-removed" from the authorizing governmental entity.

CMSA respectfully submits that this analysis makes no sense. The Acting Regional Director suggests that if CMSA simply had contracted with a third party management corporation to provide qualified faculty to teach it students, CMSA could have effectively subjected those faculty to the NLRB's jurisdiction, because they were now "employed" by a management corporation that did not directly report to a government entity. Needless to say, such a "direct reporting" principle finds no support in NLRB case law. Moreover, such an easy "fix" undermines the integrity of the Acting Regional Director's argument. If NLRB jurisdiction is that easy to create and/or defeat, what will prevent management

corporations in those states that do not have public sector collective bargaining laws from immediately transferring their employees to a "charter school?" According to the Acting Regional Director, such a maneuver would effectively absolve a management corporation and a charter school from having to collectively bargain with their employees under the NLRA.

The Acting Regional Director's attempt to distinguish *Charter Sch. Admin. Servs.* from the case at hand is further unavailing based on the underlying facts of the case. In *Charter Sch. Admin. Servs.*, all parties had conceded that the charter school was a government entity, likely because its directors were directly appointed (and subject to removal) by a local community college district. *See* 353 N.L.R.B. No. 35 at slip op. 1. Thus, *Charter Sch. Admin. Servs.* involved a private sector management corporation that was subject to the oversight of a political subdivision. In this case, there is an analogous relationship between CMSA (which is a private corporation) and CPS (which is indisputably a political subdivision of the State of Illinois). Thus, it is appropriate to apply *Charter Sch. Admin. Services* to the facts of this case.

The Acting Regional Director also failed to acknowledge that under fact patterns that are even less favorable than CMSA's position in this case, the NLRB readily has found that employers with a fair amount of government "overlap" do *not* qualify for "political subdivision" status. For example, in *Research Found. of*

the City Univ. of N.Y., the Board concluded that a not-for-profit educational corporation was a non-government entity, despite the fact that a public university chancellor, president and several faculty members served on the employer's governing board. *See* 337 N.L.R.B. at 966.

CMSA in this case is even more clearly "non-governmental" than the entity found in *Research Found. of the City Univ. of N.Y.*, because no CMSA management representative is a government official, nor are CMSA's management representatives subject to appointment or removal by a government entity. Indeed, the Illinois Charter School Law specifies that a charter school "shall be administered and governed by its board of directors or other governing body in the manner provided in its charter." 105 ILCS 5/27A-5(c). Moreover, the charter agreement between CMSA and CPS specifically provides that CMSA does not "serve as the agent, or under the direction and control, of CPS" (E. Ex. 8 at p.21).

The Acting Regional Director also erred to the extent that he suggested that compliance with state sunshine laws is enough, by itself, to qualify an entity as a "political subdivision." The NLRB in *FiveCAP, Inc.*, 331 N.L.R.B. 1165 (2000) addressed and rejected the significance of such laws. In *FiveCAP*, the employer was a non-profit corporation that administered Head Start programs in four Michigan counties. *See id.* According to Michigan law, the employer was

required to comply with Michigan's Open Meetings Act and disclose financial documents for public inspection. The Board found such facts insignificant:

> The fact that the Respondent is required to keep financial records and to make them available for public inspection signifies only that the Respondent is a recipient of public funds and that it is therefore required to account for those funds to the public. The mere receipt of public funds with the requirement that the Respondent account to the public for the spending of those funds, however, does not establish that the Respondent is a political subdivision.

Id. at 1168. Thus, the Acting Regional Director erred by placing any emphasis on CMSA's statutory obligation to comply with Illinois' Open Meetings Act and Freedom of Information Act. Indeed, compliance with such laws is not uncommon among other private sector entities. [18]

The Acting Regional Director also placed undue emphasis on the fact that CMSA's charter could be suspended or revoked if it failed to comply with the contractual obligations created by the charter. In *Charter Sch. Admin. Servs.*, the Board disposed of a similar argument propounded by one of its Regional Directors:

> The Regional Director recognized that the Employer is a private corporation whose administrators are not directly appointed or removed by public officials. . . . The Regional Director further found that, if [the sponsoring government entity] closed the Academy, the Employer's agreement with the Academy would have ended, resulting in "the public removal of all Employer

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[18] For example, Illinois law subjects riverboat gambling licensees to the Illinois Freedom of Information Act. *See* 230 ILCS 10/14(c).

> administrators of the Academy." . . . We do not agree with the Regional Director that this evidence bears on the Employer's political subdivision status. It would be a rare government contract that did not afford the government oversight of the contract, and the ability of the government to correct or cancel a contract does not, without more, change the private nature of the contracting entity.

353 N.L.R.B. No. 35 at slip p. 5 n.20. Therefore, the fact that CMSA has certain contractual obligations that it must honor (under the threat of contract cancelation or suspension) does not transform CMSA into a "political subdivision." Otherwise, the NLRB would lose the ability to regulate labor relations for virtually every regulated licensee or government contractor in the country.

Finally, the Acting Regional Director erred by relying on CMSA's various reporting requirements and submissions as proof that it constituted a "political subdivision." Almost every reporting requirement that was addressed during the hearing had nothing to do with employee terms and conditions of employment. Rather, they almost all concerned the "business" of a charter school, *i.e.*, the extent of student learning and/or the basis for determining the proper amount of school funding:

- Entering student attendance records directly into a CPS computer system called "Impact" on a daily basis (Tr. 64-65); Ali Yilmaz explained the purpose of reporting these attendance records was to show compliance with federal attendance standards (Tr. 65).

- Submitting a school calendar to CPS (Tr. 71); CPS has never rejected or revised the school calendar upon submission (Tr. 71).
- Submitting CMSA Board meeting minutes, along with the dates, times and locations of the Board meetings (Tr. 72, 75).
- Submitting CMSA's student disciplinary policy (if CMSA has declined to use CPS' policy) (Tr. 72).
- Submitting an application to CPS in order to qualify for free and reduced meals (Tr. 73).
- Submitting an annual financial and compliance audit (Tr. 74).
- Submitting the specifications for a student lottery system when there are more student applicants than open spots (Tr. 74-75).
- Submitting information regarding the expulsion of students, so that CPS can ensure that the expulsion meets due process requirements (Tr. 75-76).
- Submitting a report when a student has voluntarily transferred out of the school (Tr. 77).

As Principal Yilmaz explained during the hearing, many of these reporting requirements are intended merely as a way for CPS to monitor whether CMSA is complying with its various contractual promises (Tr. 65-66, 72). In this regard, CPS essentially serves a "regulatory" role by ensuring that CMSA meets certain contractual and regulatory goals that were outlined in its renewal application and charter agreement. At the same time, CPS does not interfere with one of the central aspects of CMSA's operations, *i.e.*, curriculum development (Tr. 97). Rather, CMSA in conjunction with Concept Schools helps establish student curriculum standards (Tr. 97).

A Board Administrative Law Judge ("ALJ") acknowledged the distinction between "regulatory oversight" versus "operational control" in *C.I. Charter Wilson Academy*, 2002 WL 1880478, Case No. 28-CA-16809 (2002). There, a charter school was subject to regulation by the Arizona Board of Education. Under the second prong of the *Hawkins* test for "political subdivision" status, the ALJ made the following comments:

> The remaining consideration in determining whether the Academy constitutes a "political subdivision" under *Hawkins* turns on whether the statutory responsibilities vested in the Arizona State Board of Education (ASBE) provides the type of connection between the individuals who operate the Academy and "public officials" as contemplated under the other prong of the . . . *Hawkins* test. Although the ASBE obviously establishes and enforces broad regulations that all charter schools must meet, its functions do not involve establishing and overseeing the implementation of operational policies for any individual school. Rather, I find the functions of that public agency are regulatory in character. As such its role relates to making determinations regarding an applicant's fitness and qualification for a charter (in effect, a license) in the first place . . . and a charter school's compliance with state law and the terms of its charter thereafter
> . . . .
>
> However, this type of regulatory oversight shown here does not make the individuals in charge at the Academy "responsible" to the ASBE within the meaning of *Hawkins*.

Id.

By emphasizing CPS' regulatory oversight in this case, the Acting Regional Director effectively resurrected the now-defunct "intimate connection" test that the NLRB rejected in *National Transp. Serv.*, 240 N.L.R.B. 565 (1979). Under the

"intimate connection" test, the Board focused on, among other things, the "nature of the relationship between the purposes of the exempt institution and the services provided by the nonexempt employer." *Id.* at 565. The Board should reject the Union's reliance on CPS' regulatory oversight for the same reasons that it rejected the test in *National Transp. Serv.* Instead, the Board should continue to apply the two-prong *Hawkins* test as first adopted in *Management Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995).

If the Board accepted the notion that government reporting requirements, by themselves, were enough to transform an entity into a "political subdivision," large segments of the U.S. economy would suddenly be excluded from the NLRB's jurisdiction. Take, for example, the Illinois gaming industry. According to the Illinois Riverboat Gambling Act, 230 ILCS 10/1 *et seq.*, employers who wish to operate a gambling establishment must comply with a variety of statutory requirements, including but not limited to:

- limitations on the location where casinos can be established, 230 ILCS 10/3(c);
- disclosure of the identity of every individual having a greater than 1% direct or indirect pecuniary interest in the riverboat gambling operation, 230 ILCS 10/6(c);
- prohibitions against owner licenses being issues to individuals with certain conviction histories, 230 ILCS 10/7(a);

- proof that management corporations have at least 16% and 4% of its ownership interests are held by minority persons and females, respectively, 230 ILCS 10/7.4(b);
- compliance with gambling supplies and equipment standards established by the Illinois Gaming Board, 230 ILCS 10/8(c);
- access by State inspectors to inspect gaming boats at any time for purposes of ensuring compliance with the Act, 230 ILCS 10/11(4);
- limitations on how gambling equipment can be purchased, 230 ILCS 10/11(6);
- restrictions on how gambling operations will be conducted, 230 ILCS 10/11(7)-(12);
- the imposition of various taxes on gambling operations, 230 ILCS 10/12-13;
- application of the Illinois Freedom of Information Act to the books and records of gaming licensees, 230 ILCS 10/14(c); and
- annual audit requirements for a licensee's financial transactions, 230 ILCS 10/15.

In addition, entities wishing to operate a gambling establishment in Illinois must navigate a lengthy application and approval process. The regulatory supervision exercised over Illinois gambling establishments is far more extensive than the Chicago Public Schools' oversight responsibilities for CMSA. *See, e.g., Emerald Casino, Inc. v. Ill. Gaming Bd.*, 377 Ill. App. 3d 930 (1st Dist. 2007) (challenging denial of casino license). Yet, there has never been a question as to whether gambling establishments fall within the NLRB's jurisdiction. *See, e.g., Alton Riverboat Gambling P'ship*, 314 N.L.R.B. 611 (1994) (exercising jurisdiction over an Illinois casino). By the same token, Illinois charter schools should not

lose NLRB jurisdiction simply because they are subject to regulatory oversight by the school district that sponsors their charter.

CONCLUSION

CMSA respectfully requests that the Board grant its Request for Review of the Acting Regional Director's Decision and Order in the above-captioned matter. CMSA further requests that the Board reverse the Acting Regional Director's decision, and find that CMSA is an "employer" within the meaning of Section 2(2) of the Act.

Respectfully submitted,

CHICAGO MATHEMATICS AND SCIENCE ACADEMY CHARTER SCHOOL, INC.

By: _____
One Of Its Attorneys

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October 18, 2010

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a true and correct copy of the EMPLOYER'S REQUEST FOR REVIEW to be served upon the following individual by electronic service on this 18th day of October, 2010.

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Arly Eggertsen
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National Labor Relations Board
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